

Before the  
Administrative Hearing Commission  
State of Missouri



DIRECTOR OF DEPARTMENT  
OF PUBLIC SAFETY,

Petitioner,

vs.

DARRELL W. VANCE,

Respondent.

No. 14-0005 PO

**ORDER**

We grant in part the motion for summary decision filed by the Director of Public Safety ("the Director"). Darrell W. Vance's peace officer license is subject to discipline because he committed a criminal offense.

**Procedure**

On January 3, 2014, the Director filed a complaint seeking to discipline Vance's peace officer license. Vance was served with the complaint and our notice of complaint/notice of hearing on January 13, 2014. He did not file an answer.

The Director filed a motion for leave to file an amended complaint on February 14, 2014. We granted the motion. Vance did not file an answer to the amended complaint.

The Director filed a motion for summary decision on April 9, 2014. We notified Vance that he should file any response by April 24, 2014, but he filed nothing.

We may grant a motion for summary decision if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts. 1 CSR 15-3.446(6)(A).<sup>1</sup> Parties may establish a fact, or raise a dispute as to such facts, by admissible evidence. 1 CSR 15-3.446(6)(B). The Director relies on the documents submitted with the motion, including his affidavit of Vance's licensure and certified copies of court records. The records are admissible pursuant to § 490.130<sup>2</sup> and § 536.070(6).

The Director also relies on the unanswered request for admissions served on Vance on February 18, 2014. Under Supreme Court Rule 59.01, the failure to answer a request for admissions establishes the matters asserted in the request, and no further proof is required. *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985). Such a deemed admission can establish any fact or any application of law to fact. *Linde v. Kilbourne*, 543 S.W.2d 543, 545-46 (Mo. App., W.D. 1976). That rule applies to all parties, including those acting *pro se*. *Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App., W.D. 1983). Section 536.073 and 1 CSR 15-3.420(1) apply that rule to this case. And, by failing to respond to the motion, Vance has failed to raise a genuine issue as to the facts the Director established therein. 1 CSR 15-3.446(6)(B).

Accordingly, the following findings of fact are undisputed.

### **Findings of Fact**

1. Vance holds a peace officer license issued by the Director that has been current and active since October 27, 2005.
2. On December 14, 2011, Vance drove his patrol car to his house, with the purpose and intent to set fire to his house.

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<sup>1</sup> All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

<sup>2</sup> Statutory citations are to the RSMo Supp. 2013, unless otherwise indicated.

3. On December 14, 2011, Vance knowingly damaged his house by setting fire to it.
4. Vance was found guilty after a trial in the circuit court of Franklin County, Missouri, of arson in the second degree, a Class C felony, in violation of § 569.050, RSMo. 2000.
5. Vance received a suspended imposition of sentence and five years' supervised probation.

### **Conclusions of Law**

We have jurisdiction over this case. § 590.080.2. The Director has the burden of proving that Vance has committed an act for which the law allows discipline. *See Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

The Director alleges that there is cause for discipline under § 590.080:

1. The director shall have cause to discipline any peace officer licensee who:

\* \* \*

- (2) Has committed any criminal offense, whether or not a criminal charge has been filed;

- (3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person[.]

#### Subdivision (2) – Criminal Offense

The certified court records establish that Vance was found guilty of second degree arson, a Class C felony under § 569.050. Although a suspended imposition of sentence does not collaterally estop Vance from presenting evidence to the contrary, it is competent and substantial evidence that he did commit the criminal offense. *Director of Public Safety v. Bishop*, 297 S.W.3d 96, 99 (Mo. App. W.D. 2009). Moreover, Vance admitted that he committed that

offense. We conclude that he committed the crime of second degree arson. Vance is subject to discipline under § 590.080.1(2).

Subdivision (3) – Active Duty/Color of Law

The Director also contends that Vance is subject to discipline under § 590.080.1(3) because “setting fire to a house endangers any person who may be in the house, the surrounding houses and properties, and any person who may be in those surrounding houses or properties[.]” We agree, but the Director has not established that Vance was either on active duty when he set fire to his house, or that he acted under color of law.

Many cases construing the term “color of law” do so in the context of 42 U.S.C. § 1983:

“The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” . . . At the same time, however, the Supreme Court has made clear that even the “[m]isuse of power” possessed by virtue of state law is action taken “under color of state law.” . . . Thus, “under ‘color’ of law” means “under ‘pretense’ of law,” and “[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority *or overstep it*.”

*Dossett v. First State Bank*, 399 F.3d 940, 949 (8<sup>th</sup> Cir. 2005).

“It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State. Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.” . . . “It is clear that under ‘color’ of law means under ‘pretense’ of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.” As the First Circuit has said, “[w]hether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties.” Absent any actual or purported

relationship between the officer's conduct and his duties as a police officer, the officer cannot be acting under color of state law.

*Roe v. Humke*, 128 F.3d 1213, 1215 -1216 (8<sup>th</sup> Cir., 1997) (internal citations omitted).

There is no suggestion from these authorities that merely driving a patrol car is tantamount to acting under color of law. The Director cites none, nor does he make any argument in support of the proposition. In *State v. Woods*, 790 S.W.2d 253 (Mo.App. S.D., 1990), the court addressed the issue of whether an off-duty policeman was automatically acting in an official capacity when he discovered illegal drugs. In that case, the court quoted approvingly from *State v. Pearson*, 514 P.2d 884, 886 (Or. App. 1973): “[O]fficial involvement is not measured by the primary occupation of the actor, but by the *capacity* in which he acts at the time in question.”

We cannot determine that Vance acted under color of law or was on active duty merely because he drove his patrol car to his house before setting fire to it. We deny the Director’s motion as to cause for discipline under § 590.080.1(3).

### **Summary**

There is cause to discipline Vance’s license under § 590.080.1(2). The Director shall inform us no later than May 28, 2014, whether he wishes to proceed to hearing on whether there is cause to discipline Vance’s license under § 590.080.1(3).

SO ORDERED on May 14, 2014.

\s\ Karen A. Winn

KAREN A. WINN  
Commissioner